

Issues: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 10/06/10; Decision Issued: 10/07/10; Agency: CNU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9421; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9421

Hearing Date: October 6, 2010
Decision Issued: October 7, 2010

PROCEDURAL HISTORY

On July 22, 2010, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant was removed from employment effective July 22, 2010 based upon the accumulation of disciplinary action.

On August 16, 2010, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 20, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 6, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Christopher Newport University employed Grievant as a Procurement Services Coordinator. The purpose of her position was:

Supports the Purchasing Department's functions and the Material Management Director, Assistance Director and Contracting Officers primarily with ongoing eVA training and development and other procurement related issues. Assist with the handling of bid solicitations in compliance with procurement regulations to include accurate and timely receipt of sealed bids and posting of solicitations on the VBO (Virginia Business Opportunity) website. Provide general administrative support to the Purchasing Department.¹

Grievant received an overall rating of Contributor for 2008 performance evaluation. Grievant had prior active disciplinary action. She received a Group II Written Notice on December 10, 2007.

eVA is a web-based purchasing system used by the Agency to announce bid opportunities, invite bidders, receive quotes, and place orders for goods and services. To access the system, Agency employees must first obtain a logon identification and password. Only employees who signed the appropriate nondisclosure forms

¹ Agency Exhibit 2.

acknowledging their obligations when using the system could be given access to the system. One of Grievant's responsibilities was to ensure that employees who received logon identifications and passwords previously had submitted the appropriate documentation.

On some occasions, Grievant had given logon identification and passwords to employees who had not signed the appropriate documents. The Agency's auditors identified this problem and gave the Agency an audit point. An audit point is a criticism of the Agency's operations. In May 2010, the Supervisor again instructed Grievant that she should obtain the appropriate documents from employees prior to giving employees logon identifications and passwords to the eVA system. The Supervisor provided Grievant with additional training regarding the system and process. The Supervisor showed Grievant the audit point drafted by the auditors.

On June 15, 2010, the Supervisor initiated the process for having five Agency employees granted access to the eVA system. She sent an email to Ms. D with the Department of General Services which operated the system. Ms. D created the user identifications and temporary passwords in the system and sent that information to Grievant in an email stating:

[Grievant] please do not give the User Id's and temporary passwords out until the users returned the attached Non-Disclosure Form. I did some inquiring and found out that they need access to the Technical Lab of Reports and Documents to run reports related to Vendor Data Standards. Also I need to revise their profile so they will not have the ability to create requisitions (unless you say they need to). Please have them signed and fax them back to my attention at [number]. I will forward them to [Ms. R] and make the changes to their eVA profile.

On June 17, 2010, Grievant sent emails to the five employees giving them their logon identification and temporary passwords. Grievant did not attempt to obtain the nondisclosure forms from the employees before giving them their identifications and temporary passwords to the eVA system.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."² Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

"Failure to follow supervisor's instructions or comply with written policy" is a Group II offense.³ Grievant was aware of the Agency's policy that she should not give logon identification and passwords for the eVA system to employees until she had received signed nondisclosure forms from those employees. Grievant received training regarding this policy and was counsel and instructed by the Supervisor to comply with that policy. On June 17, 2010, Grievant issued logon identification and passwords to five employees without first receiving nondisclosure forms from those employees thereby acting contrary to the Agency's policy and the Supervisor's instructions to comply with that policy. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with written policy and a supervisor's instructions.

Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. With the issuance of the Group II Written Notice giving rise to this grievance, Grievant has accumulated two active Group II Written Notices. Grievant's removal must be upheld.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."⁴ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued the disciplinary action should be mitigated because it was a simple mistake and she was not feeling well on June 17, 2010. This argument fails. Although Grievant's mistake was not intentional, she had been given sufficient instruction and training to enable her to avoid making the mistake. Although she did not intend to make a mistake, she intended to give the five employees access to the eVA system. The Agency has presented sufficient evidence to show that Grievant knew or should have known not to give the five employees access to the eVA system. Grievant has not presented sufficient evidence of her medical concerns to show that she was incapable of complying with the Supervisor's instruction and the Agency's policy. In

³ See, Attachment A, DHRM Policy 1.60.

⁴ Va. Code § 2.2-3005.

light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal based on the accumulation of disciplinary action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁵

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.